

SS-8 Determination—Determination for Public Inspection

Occupation

03TRA Tradespersons

Determination:

☒ Employee☐ Contractor

UILC

Third Party Communication:

☒ None☐ Yes

I have read Notice 441 and am requesting:

☐ Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"☐ Delay based on an on-going transaction☐ 90 day delay**For IRS Use Only:****Facts of Case**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from July 2016 to August 2017 as a welder. The firm issued the worker Form 1099-MISC for the years in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC. The worker believes he was an employee as he worked full-time, i.e. five days a week, and he used the firm's equipment. The firm determined the methods used. An independent contractor agreement was signed.

The firm's response stated its business is the fabrication of ornamental metals such as railings, fences, gates, and grilles. The worker and another worker gave a bid to fabricate fence panels. An agreement was signed. The worker was considered an independent contractor because he set his own schedule, although he was given a deadline to finish the fabrication. The worker was not supervised by the firm in how he did his work.

The firm stated it did not provide specific training or instruction to the worker. The worker determined the methods by which assignments were performed and he assumed responsibility for problem resolution. Reports and meetings were not required. The worker's daily routine was not applicable. Services were performed at the firm's premises during fabrication of the contracted work. The firm did not require the worker to personally perform services. The worker hired and paid substitutes or helpers. The worker stated the firm provided work assignments and assumed responsibility for problem resolution. The worker performed services on a regular, recurring basis, i.e. Monday to Friday, 8 – 10 hours per day. Services were performed inside and outside of the company. The firm was responsible for hiring substitutes or helpers.

The firm stated it provided materials and a welding machine. The worker provided his gloves, welding helmet, and tools. The worker did not lease equipment, space, or a facility. The worker did not incur expenses in the performance of services for the firm. Customers paid the firm. The firm paid the worker piece work; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The worker established the level of payment for the services provided. The worker stated the firm provided all materials, tools, and transportation. The firm established the level of payment for the services provided.

Benefits were not made available to the worker. The work relationship could be terminated by either party without incurring liability or penalty. The firm stated the worker performed similar services for others; the firm's approval was not required for him to do so. There was no agreement prohibiting competition between the parties. It is unknown if the worker advertised. The finished product was returned to the firm. The work relationship ended when the contract ended. The worker stated he did not perform similar services for others or advertise. The worker quit.

The independent contractor agreement, dated June 22, 2016, was between the worker, another individual identified as an independent contractor, and the firm. It states, in part, the workers were engaged/accepted the engagement of fabrication of all specific gateway decorative fences. Materials and equipment for fabrication would be provided by the firm. Term began on June 22, 2016, and would end on the completion of fabrication. The workers would render services primarily at the firm's shop. The daily schedule and hours worked on a given day would generally be subject to discretion, provided that an average of 40 hours per week would be worked in the performance of services. The firm would rely upon the workers to devote sufficient time as was reasonably necessary to fulfill the spirit and purpose of the agreement. The firm would pay the workers a flat rate for services performed. Payment would be made upon completion of fabrication of each gateway, i.e. five gates for five separate payments. The workers would bear all expenses. The firm could terminate the agreement based on 1) the workers' inability to perform due to illness, disability, incapacity, or death; 2) breach or default by the workers of any material obligation. The workers could terminate the agreement in the event of the firm's breach or default of any material obligation. The firm was solely responsible for procuring, paying for, and maintaining any shop equipment, paper, tools, or supplies necessary or appropriate for the performance of services.

Analysis

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, the firm's statement that the worker was an independent contractor pursuant to a written agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. In this case, the fabrication services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served and required the worker to devote sufficient time to ensure timely completion of the project. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

A person who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor, while the person who cannot is an employee. "Profit or loss" implies the use of capital by a person in an independent business of his or her own. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and, thus, does not constitute a sufficient economic risk to support treatment as an independent contractor. If a worker loses payment from the firm's customer for poor work, the firm shares the risk of such loss. Control of the firm over the worker would be necessary in order to reduce the risk of financial loss to the firm. The opportunity for higher earnings or of gain or loss from a commission arrangement is not considered profit or loss. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As the firm provided all materials and a welding machine, in addition to recognizing the worker did not incur expenses in the performance of services for the firm, the worker could not realize a profit or incur a loss.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

The firm can obtain additional information related to worker classification online at www.irs.gov; Publication 4341.